Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI, individually, and PAUL PAPRZYCKI, JR. and ANGELINA PAPRZYCKI, by their Guardians Ad Litem, their parents. PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI,

Petitioners,

versus

COUNTY OF SOMERSET, SOMERSET COUNTY PROBATION DEPARTMENT, JOHN HIGGINS, Chief Probation Officer, RONALD KIRK, and THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does an indigent defendant, facing incarceration for alleged contempt in a civil matter, have a right to counsel under the United States Constitution?

II. Can an ex-parte application be utilized for civil arrest?

III. Must an incarcerated individual be given advanced notice of a court appearance?

IV. Does an indigent person, who was incarcerated for over four months in violation of the United States Constitution and the Constitution of the State of New Jersey, without the assistance of counsel, have a remedy?

V. Should the defendant Probation Officers be held accountable, in their executory functions, for having sought an arrest warrant without complying with New Jersey Court Rules established to insure due process rights; failing to advise an indigent defendant of his right to counsel and having a system in place to make and secure that right as being effective; failing to provide an incarcerated indigent with advance notice of scheduled court hearings; failing to withdraw their request for a warrant or advise the New Jersey Superior Court Judge that, to their knowledge, the appellant's continued incarceration was unlawful and that he should be released?

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OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit in *Paprzycki, et al. v. County of Somerset, et al.*(3rd Cir, 7/28/00) is unreported, and is set forth in an Appendix attached hereto (App. 26a).

The Opinion of the United States District Court of the District of New Jersey in *Paprzycki, et al. v. County of Somerset, et al.*, U.S.D.C. N.J. (8/17/99), is set forth in an Appendix attached hereto (App. 43a).

The order for Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit in *Paprzycki, et al. v. County of Somerset, et al.* (3rd Cir. 8/31/00), is set forth in an Appendix attached hereto (App. 59a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court of the District of New Jersey was entered on July 28, 2000 (App. 1a). The Petitioners' request for a rehearing was denied on August 31, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days from the date denying the Petition for Rehearing. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

United States Constitution, Amendment XIV, Section 1

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. Section 1983

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress...

New Jersey Court Rules

The applicable New Jersey Court Rules; Rule 1:6-2; Rule 1:10-2; Rule 1:10-3; Rule 5:5-4; Rule 5:7-4; and Rule 5:7-5 are set forth verbatim on page 61a in the Appendix attached hereto.

STATEMENT OF THE CASE

Procedural History

Plaintiffs filed a Complaint and Jury Demand on February 25, 1998 in the United States District Court of New Jersey. The plaintiffs are Paul Paprzycki and his wife, Elizabeth Paprzycki, as well as two of their three children, Paul, age 8 and Angelina, age 6. They sued the defendants, John Higgins, the Chief Probation Officer, and Ronald Kirk, Probation Officer, for the deprivation of their constitutional rights during Mr. Paprzycki's incarceration in the Somerset County Jail in New Jersey. The State of New Jersey and the County of Somerset and the Somerset County Probation Department were named as defendants because the Somerset County Probation Department is an agency of both the County and State performing specific legal duties and responsibilities within and on behalf of the County of Somerset. The basis of federal jurisdiction was properly before the District Court pursuant to 42 U.S.C. Section 1983, 28 U.S.C. Section 1331, 28 U.S.C. 1332(a)(1), and 28 U.S.C. Section 1343(a)(3).

This is a section 1983 civil rights action and a tort action in which the plaintiffs seek damages arising from the plaintiff Paul Paprzycki's incarceration and the denial of various constitutional rights including: (a) denial of the right to counsel;(b) procedural due process; (c) substantive due process;(d) false arrest;(e) false imprisonment; (f) abuse of process; and, (g) wilful and wanton negligence and failure to petition for release. His wife, Elizabeth, and children, Paul Jr., and Angelina, seek collateral damages and damages from loss of familial association.

The defendant Ronald Kirk was the probation officer who handled Mr. Paprzycki's case and petitioned for his arrest and continued incarceration. The defendant, John Higgins, was his Supervisor and the Chief Probation Officer of the Vicinage.

Defendant County of Somerset filed an answer and cross claims on April 15, 1998. In lieu of filing an answer, defendants' Somerset County Probation Department, Ronald Kirk, and John Higgins moved to dismiss the complaint pursuant to Civ.R. 12(b)(6) on May 18, 1998. An Order and Opinion were entered by the Honorable Anne E. Thompson on June 17, 1998 dismissing the complaint as to defendants the Somerset County Probation Department and the State of New Jersey. The Court's June 17, 1998 Order was amended by a subsequent Order entered by the Honorable Anne E. Thompson on June 30, 1998 dismissing the complaint as to the County of Somerset.

Defendants' John Higgins and Ronald Kirk filed an Answer to the Complaint on June 29, 1998. Higgins and Kirk also filed a Notice of Appeal to the Third Circuit Court of Appeals on July 17, 1998 as to the U.S.D.C. Order dated June 17, 1998. Their appeal was dismissed by the Clerk pursuant to F.R.A.P. 42(b) without costs to either party on March 2, 2000.

Defendant's John Higgins and Ronald Kirk filed a motion for summary judgment on July 15, 1999. The Paprzycki's filed timely opposition and oral argument was held before the Court on August 9, 1999. In an Opinion and Order (App. 43a) entered by the Honorable Anne E. Thompson on August 17, 1999, the Court granted defendants Higgins' and Kirk's motion for summary judgment and dismissed the complaint.

The Paprzycki's filed timely Notice of Appeal to the Third Circuit Court of Appeals on September 9, 1999, which was subsequently denied as set forth in the Memorandum Opinion of the United States Court of Appeals for the Third Circuit (App. 26a). The Paprzycki's timely filed a Petition for Panel Rehearing and for Rehearing En Banc which were denied by the Third Circuit (App. 59a).

Facts

Paul Paprzycki, as indigent, was incarcerated for four months, without the assistance of counsel, for failure to pay a debt when he had no financial resources to do so.

The plaintiffs are Paul Paprzycki and his wife, Elizabeth Paprzycki, as well as two of their three children, Paul, age 6 and Angelina, age 4 (ages are as of the time the cause of action arose). Mrs. Paprzycki was one month pregnant at the time that the incidents which gave rise to the litigation arose.

In September of 1995, the Paprzyckis lived in a small apartment in Bound Brook, New Jersey. The family's primary means of support was Paul's weekly pay check. Paul and Elizabeth had no assets. They did not even own a car. They rented their apartment and had no savings.

At the time, Mr. Paprzycki was working for Jeff Alte Roofers and earning approximately $400.00 per week. His net pay after taxes was approximately $290.00. He used those funds to support his wife and his two children, who are also plaintiffs in this action.

Paul Paprzycki was divorced from Katherine Paprzycki (now Katherine Presser Traynor), on May 28, 1987. While the divorce judgment did not incorporate any specific support obligations, there were two existing orders of support which provided for the payment of $60.00 and $63.00 per week, respectively, for each of two children born of that marriage. A wage execution for support was entered at the time payable through the Somerset County Probation Department.

It is undisputed that Mr. Paprzycki made payments toward the support obligation over a period of close to two years. Paul and Katherine began to cohabit once again after the divorce for some period of time. Katherine indicated to Paul that she would call the Probation Department and tell them to terminate the Support Order. During the period of cohabitation,

the wage execution for support was terminated. There was no evidence which suggested that the termination of the wage execution was other than as a result of the telephone call.

The parties eventually permanently separated. Mr. Paprzycki made voluntary payments thereafter, but stopped at one point when his former wife entered into a relationship with another man. No enforcement action was undertaken by the Probation Department after Mr. Paprzycki stopped making payments. Mr. Paprzycki assumed this was because his ex-wife had terminated the Order. On August 16, 1990, an Order was entered and the Somerset County Probation Department was relieved of any further supervision of support or collection.

On June 18, 1993, Katherine Paprzycki's present husband adopted the children upon notice to Mr. Paprzycki. The plaintiff's support obligation then terminated. The Probation Department file reflects that it was aware of the adoption proceeding at that time.

Over two years later on July 13, 1995, for specific reasons which the Probation Department cannot indicate, this matter was reopened by the Probation Department. The Order which re-opened the case *made no provisions for an arrest warrant to be issued under any circumstances*. It ordered that collection be by income withholding. The Probation Department had an employment verification for plaintiff in its file. The defendant, Kirk, made no effort at wage garnishment. Even though the plaintiff's support obligations had terminated as a result of the adoption, defendant Kirk made an ex parte request for a bench warrant for failure to pay arrearage for a period which had expired over two years earlier. A bench warrant was issued on September 8, 1995. At the time that Kirk made the request for the bench warrant, Kirk submitted the affidavit of Melissa Callahan to the Court. That affidavit was inaccurate as it reflected arrearage of $26,807.00 which were not due. Kirk acknowledges that this was computed on the assumption that there was an existing support obligation. Kirk's

actions did not reflect the Judgment of Adoption, and so when the application was made to the Court, the Judge was under the impression that there were existing children from the marriage who were not being supported.

Kirk made his application to the Court without following the procedures required by Rule 5:7-5, Rule 5:5-4, and Rule 1:10-3 of the New Jersey Court Rules. Those Rules require notice and an opportunity to be heard when the application is made for a bench warrant. Kirk claims he was relying on provisions in a 1987 Order (which he terms a "Self-Executing Order"), which indicated that "two missed payments and a bench warrant would issue." This Order had been vitiated by the effect of the August 16, 1990 Order and the terms of the July 29, 1995 Order which reopened the case.

Paul Paprzycki was incarcerated on October 17, 1995. On October 18 he was brought before the Honorable Graham T. Ross. The transcript of the proceeding consists of just 37 lines. The transcript records the plaintiff as asking whether "he could explain". He was told "no". Although Paprzycki indicated to Probation that he was indigent, Kirk who had instituted the enforcement action, did not advise him of his right to assigned counsel.

Mr. Paprzycki was remanded to the Somerset County Jail. There he was visited on a regular basis by the defendant, Kirk, and, or Melissa Callahan who reviewed Mr. Paprzycki's financial circumstances.

Although Probation Department employees were directed to visit individuals incarcerated for child support obligations and conduct an interview, the employees were not trained as to the reasons for which they were making the interview, nor did they keep any notes of the interviews or make any indication to the file. They were not trained to advise Mr. Paprzycki that any information he gave to the interviewer could be used against him for the purposes of his continued incarceration, nor to advise him of his right to counsel.

The interviews, in fact, were set up by defendant Higgins, to insure that the incarcerated debtors would not languish in jail between "review proceedings." Somerset County had a policy of reviewing the status of incarcerated debtors every two weeks. However, at some point, Somerset County Judge Ross changed the policy to review every 30 days. Higgins felt at that time that the debtor should be interviewed every week to determine their financial status.

As a result of this change in policy, Judge Ross issued a memo dated January 31, 1995, in which he outlined the policy. Higgins was aware of the memo, but failed to notify his probation officers of its existence and directives.

In that memo, Judge Ross indicated that incarcerated obligors would be interviewed by the Probation Department and the person who conducted the interview was to report back. In spite of the existence of that memo, the interviewers in the Probation Department made no notes or memorandum. Neither the interviewers, nor Kirk, nor Kirk's immediate supervisor, were made aware of the existence of the memorandum. The memo also indicated that if an individual in Mr. Paprzycki's circumstances was incarcerated for longer than 30 days, there was a presumption that they did not have an ability to pay and ought to be released.

Mr. Paprzycki indicated to the defendants that he had no assets, liquid or otherwise, with which to make a lump sum payment towards arrearage. He indicated that his only source of income was his job and that he was willing to make a weekly payment towards the arrearage via garnishment of his wages. In October he further represented that his employer would lend him $1,000.00 to pay in a lump sum on account of the arrearage.

Mrs. Paprzycki did not have any assets with which to pay any lump sum towards the arrearage. While her husband has been incarcerated, Mrs. Paprzycki had no means whatsoever to support herself and their two children. She was

forced to apply for and began receiving public assistance - Aid to Families with Dependent Children (AFDC). In addition she had insufficient funds to pay the rent. The landlord served her with an eviction notice.

Defendant Kirk knew of these circumstances and knew that the plaintiffs were indigent but took no steps to vacate, or lift, the arrest warrant he sought. He made no effort to call these circumstances to the attention of the Court, pursuant to the directives contained in the Court's memoranda, nor to schedule a plenary hearing on the plaintiff's ability to pay, although he was responsible for such scheduling.

During the entire period of time, the plaintiff was without the assistance of counsel, although he was indigent. He was never advised by the Probation Department or its representatives, that he had a right to assigned counsel if he was indigent. On November 17, 1999, he was brought before the Court for a "review" of his civil incarceration. He was not given any advanced notice of this Court proceeding, but was simply brought over by the Jail on that date at Kirk's direction. Therefore, he had no opportunity to prepare for the hearing. Kirk indicated that Mr. Paprzycki was never given advance notice of when review "hearings" would be held, but that he simply called over to the Jail and asked for Mr. Paprzycki to be brought over the day of the hearing. This occurred each month from November to February. Defendant Kirk did not report to the Court that Mr. Paprzycki contended that he was indigent and that he had reported to the Probation Department during his weekly interviews that he had no money to pay the outstanding support obligations. In November, Kirk did not report to the Court that this was Paprzycki's first 30 day review hearing and that there was a presumption under Judge Ross' January 31, 1995 memo that Paprzycki should be released. He did not report, pursuant to the January 31, 1995 memo, on any conditions which he would suggest to the Court would accompany Paprzycki's release. The "review hearing" was

perfunctory and was not actually a hearing.

Paprzycki was apparently brought before the Court on 30 day intervals. He was brought before the Court on October 18, 1995; November 17, 1995; December 22, 1995, January 30, 1996; and February 2, 1996. On three of these dates the Probation Department reported a different amount which Paprzycki owed

Each of the reported figures was inaccurate. The figure should have been set and constant since it was all arrearage and there was no continuing support obligation. On none of these dates did defendant Kirk make any report on the record to the Court of what he knew about Paprzycki's inability to pay. On each of these dates, Mr. Paprzycki was held over in lieu of payment of these amounts, even though he had no assets. At each of these proceedings, Mr. Paprzycki was denied his due process rights on account of the actions or inaction of Kirk, in that (1)Mr. Paprzycki was never advised of his rights to assigned counsel; (2) Kirk never advised the Court of any information that he received concerning Paprzycki's inability to pay; (3) Kirk never advised the Court that under the Court's January 31, 1995 policy Paprzycki should be released, since there was a presumption of indigence; (4) Kirk never advised the Court that he had reason to believe that Paprzycki was indigent; (5) Kirk, although responsible for scheduling the proceedings, never gave Paprzycki advanced notice of the proceeding to provide the opportunity for preparation. The Jail was merely notified and Paprzycki was "brought up.;" and, (6) Kirk negligently reported to the Court three different versions of the amount that the Probation Department contended was due on the support arrearage.

The net results of Mr. Paprzycki's incarceration were (a) he lost his job, his only source of income; (b) his pregnant wife and two children were left without any means of support and became a public charge on the welfare rolls; (c) his ex-wife received no money on account of the arrearage; and, (d) finally

and more sadly, his then young six year-old son and four year-old daughter spent four months without a father and a male role model during very tender development years.

On February 13, 1996, this office undertook a pro bono representation of Mr. Paprzycki. On February 26, 1996, the Superior Court of New Jersey, Appellate Division vacated the warrant for arrest and freed Mr. Paprzycki and directed that he be accorded a full ability to pay hearing before the Superior Court. When that hearing was held on April 17, 1996, Mr. Paprzycki, represented by counsel, was not re-incarcerated. He was not required to make any substantial payment on past due arrearage. Rather, he was ordered to pay $65.00 per week toward outstanding support.

Defendant Higgins is the Chief Probation Officer of the Vicinage. He never trained or directed that Kirk be trained in the substantive and procedural law of child support enforcement. He never established procedures to insure that indigent obligors were advised of their right to counsel. Nor did he establish procedures or train Probation employees about the purposes for interviewing incarcerated obligors nor in preparing and conveying a report to the Court in accordance with the department's policy.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

RIGHT OF AN INDIGENT TO COUNSEL

The United States Supreme Court has never articulated a right to counsel for cases of civil contempt. As a result, New Jersey has not afforded such a right to indigents. Paul Paprzycki, an indigent, was therefore incarcerated for four months without an attorney and without the financial means to secure his release.

In its decision, the Third Circuit indicates that neither the Third Circuit nor the Supreme Court has ruled on whether there is a right to counsel for cases of civil contempt. The Third Circuit assumed that the right exists, but held that there was no obligation on behalf of the Probation Officer who triggered the arrest to inform the defendant of that right. Such a holding makes the right "ephemeral."

The right to counsel in these types of cases, is recognized in other circuits. Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), cert. denied 474 U.S. 1061 (1986); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983).

It is respectfully suggested that this Court should clearly articulate that right at this time, together with an effective mechanism to insure the application of that right and accountability. There must be a remedy for an indigent person who is incarcerated four months -- warehoused in callous disregard of his constitutional rights.

The issue in Walker, supra, was "whether an indigent person facing incarceration in a civil contempt action for non-support is entitled to have appointed counsel." Walker, 768 F.2d at 1182. The substantive issue addressed by the Walker court was the argument "that petitioner was not entitled to appointed counsel because the contempt proceeding that resulted in his incarceration was a civil rather than a criminal

proceeding." Walker, 768 F.2d at 1183.

Quoting this Court's decision in Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, reh. denied, 453 U.S. 927 (1981), the Walker Court stated, "It is the defendant's interest in personal freedom, and not simply the special sixth and fourteenth amendment right to counsel in criminal cases, which triggers the right to appointed counsel." Walker, supra, at 1183. The Court continued,

> It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used...The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty.

Id. citing Ridgway, supra, at 1413.

The trial court in the Walker case had rejected petitioner's claim to a right to counsel because it believed that the petitioner held "the keys to the prison door in that he need serve no time in jail if he pays to purge the contempt." Walker, supra. at 1183.

The Tenth Circuit Court of Appeals reversed, stating:

> If petitioner is truly indigent, his liberty interest is no more conditional than if he were serving a criminal sentence; **he does not have the keys to the prison door if he cannot afford the price. The fact that he should not have been jailed if he is truly indigent only highlights the need**

for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigence and ensuring that he was not improperly incarcerated. The argument that the petitioner has the keys to the jailhouse door does not apply to diminish petitioner's liberty interest. (Emphasis added.) Walker, 768 F.2d at 1184.

...the risk of an erroneous deprivation of liberty created by refusing to appoint counsel for the indigent petitioner is high. The courts have long recognized the importance of a lawyer in protecting the right to liberty. (Citations omitted.) The presence of counsel goes to the very integrity of the fact finding process. As the this Court has noted:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law ...He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Powell v. Alabama, 287 U.S. (1932). The

> issues in a proceeding for wilful non-support are not so straightforward that counsel will not be of assistance in insuring the accuracy and fairness of the proceeding. This is particularly true where the petitioner is indigent and is attempting to prove his indigence as a defense to wilfulness.

Walker, 768 F.2d at 1184. The Tenth Circuit in Walker concluded at 1185:

> ...If, with the assistance of counsel, he is unable to prove indigence, it may validly jail him for contempt. It may not, however, rely on a contempt order entered without the assistance of counsel and without notice of the right to appointed counsel.

The Third Circuit in its decision, determined that it was the obligation of the Superior Court Judge in New Jersey to inform Mr. Paprzycki of his right to counsel. This finding effectively made the violation of the right not actionable.

However, under existing Third Circuit decisions, the Probation Officers could and should have been held accountable. Under State law, the defendants undertook the affirmative act of seeking Mr. Paprzycki's incarceration. Therefore, as State agents, they had an obligation upon obtaining his arrest, to inform him of his right to counsel. That obligation should not be left solely to the Court. The Judge acts as the ultimate guardian of the Constitution. In other circumstances of arrest, such as police action or action by prosecutorial agencies, the law does not excuse the arresting authorities from their obligation to protect this basic right and transfer that responsibility to the Judge. There is no reason to make Probation Officers a special case.

The constitutional deprivation went beyond merely failing to inform the plaintiff of his right. The right is ineffectual if there is no procedure in place to implement the right. It cannot be expected that the Superior Court Judge was to be solely responsible for not only advising the plaintiff of his right to counsel, but establishing and administering a procedure for evaluating entitlement and assigning and providing the attorney. This responsibility lay not with the judiciary but with the State employee (the Probation Officer) who sought to use the judicial process to incarcerate an indigent.

The defendants acknowledged not only that they were unaware of the right, but that they had no system to provide assignment or effective assistance of counsel. This callous indifference, when coupled with the fact that they let Mr. Paprzycki languish unlawfully in jail for over four months because he could not pay a debt, provides a sufficient factual basis upon which a jury could find liability.

There were also numerous steps in the process, each of which involved the defendants, which were more appropriate intervals for the incarcerated indigent to be informed of his right to counsel, then at the moment he appeared before the judge:

> A. Prior to the appellant's first appearance he was interviewed by the defendant Kirk or his subordinate;
> B. During the weekly interviews by the defendant in the jail cell for the purposes of determining whether the plaintiff had the ability to pay.
> C. After the initial 30 days of incarceration when the defendants' own policy indicated that there was a presumption that the plaintiff was indigent.

Given these facts, it is respectfully suggested that the Third Circuit erred in affirming the District Court Judge determination to grant Summary Judgment dismissing the

plaintiffs' claim for damages for failure to provide him counsel as an indigent.

It is respectfully suggested that the United States Supreme Court clearly articulate the right to counsel, and then provide indigents with certainty that State employees recognize and give effect to that right and are made accountable for failure to do so.

The defendants had an affirmative responsibility to conduct their duties in accordance with the law. They cannot fail to educate themselves, or train their subordinates, and then in effect take the position that they are not responsible because "the judge did not do it." The defendants set the scene for the Judge. The Judge hears the case against the backdrop of the Probation Department's application for an arrest warrant. It can also be assumed that he hears the case, secure in the knowledge that defendant Kirk has interviewed each obligor once a week and would advise the Court if the obligor had no assets or if the obligor had been incarcerated for longer than 30 days in violation of Judge Ross's January 31, 1995 directive, or was contending indigence and needed assigned counsel. The defendants undertook constitutional obligations when they acted to deprive Mr. Paprzycki of his liberty. Defendant Higgins admitted that at his deposition. Kirk acknowledged that part of his responsibility was to help the Judge "refresh" his recollection since the court has "so many cases."

The Third Circuit has determined that Probation officers can be liable for activities undertaken in their executory functions. Harper v. Jeffries, 808 F 2d 281, 284 (3rd Cir. 1986); Thompson v. Burke, 556 F 2d. 231, 238-239 (3rd Cir 1977). Wilson v. Rackmill, 878 F. 2d. 772 (3rd Cir. 1989); and see Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983), *cert. denied*, 466 US 949, 104 S Ct 2150, 80 L Ed. 2d 536 (1984); Ray v. Pickett, 734 F. 2d 370 (8th Cir. 1984). The Third Circuit erred in not applying these principals in the case.

In Wilson, supra, the Third Circuit concluded that

allegations that federal probation officers who had "investigated allegations", "typed a warrant application", "issued the warrant", and "initiated criminal prosecution," and an "investigation" were engaged in "executive and investigatory" functions and so were not absolutely immune from liability. The Third Circuit reversed a District Court Rule 12(b) (6) motion dismissal which had been based upon the grounds of absolute immunity.

In Harper, the Third Circuit actually reversed the District Court's dismissal of a claim against a probation officer with a finding that the Probation Officer whose "specific role in this controversy, as the person who charged the appellant with wrongdoing" and presented "evidence" to that effect, also appears to be more executive than judicial in nature:

> The question of Jeffries' immunity from suit is far less obvious. Clearly Jeffries' general responsibilities as the appellant's probation officer were more executive than judicial in nature. In addition, his specific role in this controversy, as the person who charged the appellant with wrongdoing and presented "evidence" to that effect, also appears to be more executive than judicial in nature. Indeed as the *Thompson* court noted:
>
> > The work of a Pennsylvania State Parol Board member clearly includes facets of quasi-judicial duties in affecting the length of sentences, *nonetheless they are not judicial officers. They are in reality executive officers carrying out the policy of the State in respect to probation and parole.*

> *Id.* At 237-38 (emphasis added). The *Thompson* court further noted that, in their executive capacity, probation officers are not entitled to absolute immunity from suit, but only to a qualified, good-faith immunity.

Harper at page 284.

In Galvan v. Garmon, 710 F.2d 214 (5th Cir. 1983), *cert. denied*, 466 US 949, 104 S.Ct. 2150, 80 L Ed. 2d 536 (1984), the Court of Appeals held that a State Probation officer who mistakenly caused petitioner's arrest and incarceration was only entitled to qualified immunity.

In Ray v. Pickett, 734 F. 2d 370 (8th Cir. 1984), a probation officer was held to only have qualified immunity in regard to a report prepared to secure a parole violators' warrant. The Court described the varying functions of a probation officer. It noted that there were some aspects that were so intimately related to the judicial function that absolute immunity was warranted: for example the preparation of a criminal presentence investigation report at the explicit direction of the court. However when the officer was acting "at her own initiative" they are entitled only to qualified immunity, Ray page 373.

The extent to which the defendants in this action should be accountable for Mr. Paprzycki's four month incarceration, should have been left to the jury. They had extensive responsibilities and obligations. They should not be excused from those obligations as a matter of law.

PROCEDURAL DUE PROCESS RIGHTS

The civil arrest warrant was procured ex parte in violation of New Jersey Court rules. Paul Paprzycki, after his

incarceration, was never given advanced notice of subsequent review hearings.

It is respectfully submitted that the Third Circuit erred in holding that the defendants did not violate Paprzycki's constitutional right to due process when they failed to provide him with adequate notice and opportunity to be heard (1) at the time of the issuance of the arrest warrant, and (2) on subsequent occasions when his monthly "review" hearings were held.

It is undisputed that Paprzycki received no prior notice of the application for his arrest. He also languished in jail for four months and was never given prior notice of when he would be brought to Court on a monthly basis for a "reconsideration" of his incarceration. He was simply "brought upstairs" from the jail. These are significant violations of an indigent person's procedural due process rights for which there should be redress.

Basic concepts of due process require that an individual be afforded notice and an opportunity to be heard before their basic rights are effected.

The New Jersey Supreme Court has noted in Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145, 162 (1998):

> In Fuentes v. Shevin, supra, 407 U.S. at 80, 92 S. Ct. at 1994, 32 L. Ed. 2d at 569, the Supreme Court, quoting from Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L. Ed. 531, 534 (1864), asserted:
>
> > "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'
>
> [5] The first prerequisite then of due process is

fair notice, Avant v. Clifford, 67 N.J. 496, 525 (1975), so that a response can be prepared and the respondent fairly heard. As stated by Judge Goldmann in Department of Law and Public Safety v. Miller, 115 N.J. Super. 122, 126 (App. Div. 1971):

> "Adequate notice and an opportunity to prepare remains the key to proper administrative proceedings.***"

The plaintiff has a cause of action for violation of his 14th Amendment due process rights since the defendant Kirk sought an Order for arrest without complying with a procedure which required Notice and an Opportunity to be Heard before his arrest. See Heck v. Humphrey, 512 U.S. 477, 129 L.Ed. 2d 383, 114 S.Ct. 2364 (1994) footnote 7, and the cases cited therein, 129 L.Ed.2d 394; Malley v. Briggs, 479 U.S. 335, 89 L. Ed.2d 219 (1986). Kirk did not follow procedures articulated in the New Jersey Court Rules designed to provide litigants with their due process rights. Rule 5:7-5 which governs the enforcement proceeding provides in pertinent part:

> *Failure to Pay; Enforcement by the Court or Party*
> *a) Contempt and Relief in Aid of Litigant's Rights.* If a person fails to make payments ... as directed by an order or judgment, the Probation Division responsible for monitoring and enforcing compliance shall notify such person by mail that such failure may result in the institution of contempt proceedings. Upon the accumulation of a support arrearage equal to or in excess of the amount of support payable for 14 days...as ordered, the Probation Division shall file a verified statement setting forth the facts establishing disobedience of the order or

> judgment. The court in the county in which the person against whom the award is made resides, ... may then, in its discretion, institute contempt proceedings in accordance with Rule 1:10-2, **and an aggrieved party, or the Probation Division on that person's behalf, may apply to the court for relief in accordance with Rule 1:10-3.**

There is no contention that the proceeding involving Paprzycki was brought by the Court under Rule 1:10-2. (As an aside, if it were, the proceeding would have to be on "notice" R. 1:10-2(a), Paprzycki would be entitled to Release Pending a Hearing R. 1:10-2(b) and the matter would be prosecuted by the State. R. 1:10-2(c).)

Under R. 1:10-3 the Probation Department acts, not on behalf of the Court, but on behalf of the private litigant (the Obligee). Under R. 1:10-3, the litigant **applies** for an Order in Aid of their Rights. When a request for a bench warrant is made, Rule 5:7-5 requires that an **application** be made to Court, pursuant to Rule 1:10-3. Under R.1:6-2 **every application** to a Court for an Order must be made upon Notice. **This procedure implements what is required by concepts of rudimentary procedural due process.** Another Family Part Rule, Rule 5:5-4, clearly requires that Rule 1:10-3 enforcement applications can only be made upon motion and notice to the defendant:

> All pre-divorce motions, ***all enforcement motions (also known as motions for enforcement of litigants' rights, R. 1:10-3)*** ... must be filed 16 days before the return date. (emphasis added)

Clearly then, the defendants used a constitutionally defective procedure to obtain the warrant for Paprzycki's

arrest. The plaintiff was entitled to Notice and Opportunity to be heard **before** he was incarcerated and lost his liberty. These procedural requirements must be complied with to insure that Mr. Paprzycki is not arrested by mistake. That was not done in this case.

It is respectfully suggested that the Third Circuit erred in its application of law when it determined that the New Jersey Court Rule, Court Rule 5:7-4, which is designed to comply with the requirements of procedural due process, did not apply in this case. Not only did the defendant Kirk obtain the original arrest warrant without notice and an opportunity to be heard to Paprzycki, Kirk violated Paprzycki's due process rights in the manner he scheduled the subsequent review hearings. Kirk was responsible for scheduling those hearings. Kirk's subsequent scheduling of Paprzycki's "hearings" was done without notice to Paprzycki. Kirk indicated he would just call down to the jail prior to the hearing and tell them to bring Paprzycki up. Therefore, Paprzycki was not given an "opportunity to prepare" a fair response so the respondent (Paprzycki) could be fairly heard. Kirk is liable for this constitutional violation, since he was the one responsible for scheduling the hearings.

In In Re: Gault, 387 U.S. 1, 87 S.C. 1428, 18 L.Ed. 2d 527 (1967), this Court articulated the keystone principals of due process in connection with the hearing of a 16 year old juvenile. On the night when the juvenile was taken into custody, the parent was orally informed that there would be a hearing the next afternoon. The only written notice that the parents received at the time was a note on plain paper from one of the police officers, 387 U.S. 31; 18 L.Ed. 2d. 548.

This Court found that such notice clearly violated due process requirements:

> We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process

> requirements, must be given sufficiently in advance of the scheduled court proceedings so that reasonable opportunity to prepare will be afforded ..." 387 U.S. 33, 18 L. Ed. 2d 549.

Notice given the day of the hearing (or no notice at all, as with Paprzycki's case), is not timely and:

> ...such written notice be given at the earliest practical time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described -- that is notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parent's right to his custody are at stake, without giving them timely notice, in advance of the hearing... 387 U.S. 33-34, 18 L.Ed. 2d 549-550.

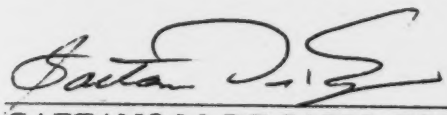
Defendants had the plaintiff arrested on an ex-parte application without complying with New Jersey Court Rules which required that a motion be made and that the plaintiff be given the prior opportunity to be heard. Then once arrested, the defendants did not advise Mr. Paprzycki, as an indigent that he had a right to assigned counsel. Knowing that he was indigent they permitted his continued incarceration for four months and provided him with proceedings denominated as "hearings" but without any advance notice of his court appearances. This is not a process which meets minimal standards of due process.

For each of these serious constitutional violations, the Third Circuit Court of Appeals held there was no effective civil remedy under 42 U.S.C. Section 1983. This Court should review this case to clearly establish the rights, and articulate the right to a remedy under 42 U.S.C. Section 1983.

CONCLUSION

For all of the reasons outlined above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit; and, ultimately, to vacate and reverse the order below and remand the matter to the District Court for trial.

Respectfully Submitted,



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APPENDIX

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO.99-5777

PAUL PAPRZYCKI; ELIZABETH PAPRZYCKI; PAUL PAPRZYCKI, JR.,by his Guardians Ad Litem, his parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI; ANGELINA PAPRZYCKI, by her Guardians Ad Litem, her parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI, Appellants

V

COUNTY OF SOMERSET; SOMERSET COUNTY PROBATION DEPARTMENT; JOHN HIGGINS, Chief Probation Officer; RONALD KIRK; THE STATE OF NEW JERSEY

On Appeal From The United States District Court
For the District of New Jersey
(D.C. Civil No. 98-cv-00871)

District Judge: Honorable Anne E. Thompson

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 18, 2000
BEFORE: MANSMANN, RENDELL and STAPLETON, Circuit Judges
(Opinion filed: July 28, 2000)

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge:

Paul Paprzycki and his wife, Elizabeth Paprzycki, as well as two of their three minor children, Paul and Angelina, filed a complaint in the District Court against the County of Somerset, the State of New Jersey, the Somerset County Probation Department, and two of its officers, John Higgins, the Chief Vicinage Probations Officer, and Ronald Kirk, a Probations Officer. In summary, the complaint asserted in the following claims: "Count I: negligence on the part of all defendants; Count II: a deprivation of liberty without due process of law and the right to equal protection of the laws, and other rights and privileges, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments by all defendants; and Count III: deliberate indifference to plaintiffs' constitutional rights as to the defendants County of Somerset, Probation, State of New Jersey, and Higgins under a supervisory liability theory." Paprzycki v. County of Somerset et al., 98-871 (D.C. N.J. 1998) (App. 84a).

The State of New Jersey, Somerset County, and the Somerset County Probation Department, filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). The District Court dismissed all the claims against them.

Higgins and Kirk filed motions for summary judgment which were granted by the District Court. The plaintiffs appeal only these summary judgments, and Higgins and Kirk will be referred to hereinafter as "the defendants" or the "appellees." We will affirm.

I.

Paul Paprzycki was divorced from Katherine Presser Traynor on May 28, 1987 Prior to their divorce, Paprzycki was already subject to two existing child support orders For several months following their divorce, Paprzycki and Traynor

continued to live together, during which time Paprzycki paid his child support.

During this period of cohabitation, Paprzycki alleges that Traynor indicated to him that she would call the Somerset County Probation Department ("Probation Department") and tell it to terminate the support order. Traynor, in contrast, alleges that the two of them discussed this possibility, but that she ultimately decided not to terminate the order. Paprzycki, nevertheless, was under the impression that he was no longer obligated to pay child support; accordingly, Paprzycki stopped doing so.

Several months later, the two permanently separated, and Paprzycki moved to Florida. Paprzycki did not contact the Probation Department to inform it of his change of address, even though he was required to do so under the 1987 child support orders. Paprzycki lived in Florida from 1987 to 1994 with his new wife, Elizabeth Paprzycki. Paul and Elizabeth Paprzycki had three children together.

Meanwhile, in New Jersey, the Probation Department was unable to locate Paprzycki to collect child support and arrears from him. Finally, on August 16, 1990, the Superior Court entered an order relieving the Probation Department from any further active supervision of Paprzycki's case. The order stated that the department could "close [its] files on this matter, but continue locate efforts and reopen collection enforcement at the time the obligor is located." (App. 10la.)

Approximately three years later, after Traynor was remarried, her new husband adopted the two children. At that point, Paprzycki's obligation to pay child support officially ended, although he still owed a significant amount of money in arrears.

In 1994, Paprzycki moved back to New Jersey from Florida. Approximately a year later, the Probation Department became aware of his return. Shortly thereafter, at the request of the Department's investigator in charge of Paprzycki's child

support case, Melissa Callahan, the Superior Court issued an order to reopen his case and resume collection. A "Notice of Delinquency" was sent to Paprzycki's home, informing him that he was obligated to "resume support payments immediately," and that "continued disregard of this obligation may result ... in contempt proceedings against [him] that may lead to [his] imprisonment." (App. 105a.)

Paprzycki did not make any payments. Callahan then filed an affidavit satisfying the requirements for a bench warrant to be issued. On August 24, 1995, the Court issued a bench warrant for Paprzycki's arrest.

Paprzycki was arrested on October 17, 1995, and provided a hearing before the Court the following day. It remanded Paprzycki to jail after a short hearing. The Court did not permit Paprzycki at that time to explain his financial circumstances. While he was incarcerated, Paprzycki was interviewed about once a week either by Kirk or by Callahan. The interviews were designed to see whether there was any change in Paprzycki's status.

For the next four months, Paprzycki remained in jail. During this time, he was granted monthly hearings before a Superior Court judge. Paprzycki was never given notice as to when the monthly hearings would be held until the day of the hearing. At no time throughout his incarceration was Paprzycki informed that he could hire counsel or that a counsel would be provided for him if he were deemed indigent. With the assistance of pro bono counsel, Paprzycki was finally released from jail after having spent approximately 133 days there.

Paprzycki alleges that during the four months he was incarcerated, his family suffered financially and emotionally because he was unable to work and support his family. His children performed poorly in school, his wife was forced to go on welfare, and his family was evicted from their apartment because they did not have enough money to pay for rent.

II.

The District Court had subject matter jurisdiction over the federal law claims in this case pursuant to 28 U.S.C. § 1331(a)(l), 28 U.S.C. § 1343(a)(3), and 28 U.S.C. § 1983. The plaintiffs assert that the District Court also had subject matter jurisdiction over their state law claims under 28 U.S.C. § 1332(a)(l), since the parties are from different states and the amount in controversy is allegedly over the statutorily required minimum; this is, however, one of the issues in dispute. This Court has appellate jurisdiction over the final judgments of the District Court under 28 U.S.C. § 1291.

III.

Section 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States that take place "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory" when committed by an officer who is acting under the color of state law. 42 U.S.C. § 1983. Section 1983 provides the cause of action; it "does not create the substantive right, but provides a remedy for the violation of rights created by federal law." Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995) (citing Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985)).

Since the defendants do not dispute the fact that they were acting under the color of state law during the pertinent time, the question in this case is whether the plaintiffs have identified facts supporting their claim that the defendants deprived them of rights guaranteed by the Constitution of the United States.

1. **Did the District Court err in holding that, even if a constitutional right to counsel exists for indigent defendants in civil proceedings, the defendants did not have a constitutional duty to**

inform Paprzycki of that right?

Neither the Third Circuit nor the Supreme Court has ruled on whether there is a right to counsel for cases of civil contempt. We may assume for present purposes, however, that such a right exists. The District Court made such an assumption and nevertheless denied relief, holding that "even assuming the plaintiff had a right to counsel, the court, and not Kirk or [anyone else in the Probation Department]; had the responsibility to advise him of that right." Paprzycki v. County of Somerset et al., (D.C. N.J. 1998) (App. 93a) (emphasis added). We agree.

As the Court held in Walker v. McLain, 768 F.2d 1181, 1185 (10th Cir. 1985): "An indigent's right to appointed counsel imposes on the court an obligation to inform him of that right." (Emphasis added). Other courts that have found a right to counsel in civil contempt proceedings also agree that judges bear the responsibility of informing indigent defendants. See e.g., Black v. Division of Child Support Enforcement, 686 A.2d 164, 168 (Del. 1996) ("the trial judge is obligated to determine in the first instance whether the defendant faces the possibility of incarceration"). Thus, even if a right to counsel exists in this situation, the burden of determining if a defendant is indigent and informing indigent defendants of that right lies in the hands of the Court and not state officers in the positions of either Kirk or Higgins.

2. Did the District Court err in holding that the defendants did not violate Paprzycki's constitutional right to procedural due process by failing to provide the plaintiff with adequate notice and opportunity to be heard (1) at the time of the issuance of the arrest warrant and (2) on subsequent occasions when monthly hearings were held?

Paprzycki argues that the defendants denied him of his right to procedural due process under the Fourteenth Amendment, U.S. Const. Amend. XIV, both at the time the arrest warrant was issued and each month thereafter for the next four months, when Paprzycki was brought before a judge for a hearing. He argues that adequate notice prior to the arrest and adequate notice prior to subsequent monthly hearings, as required by the Fourteenth Amendment, were not provided to him.

A. The Arrest Warrant

It is undisputed that Paprzycki was aware of the February 1987 order for child support informing him of his obligations and placing him on notice that a warrant might be issued upon the first or second missed payment. It is also undisputed that a Notice of Delinquency was mailed to Paprzycki in July 1995, after the investigator assigned to his case discovered and confirmed that Paprzycki had resumed residence in New Jersey. The 1995 notice indicated (1) that Paprzycki had failed to comply with the February 1987 order and (2) that he owed over $26,000 in arrears. Moreover, the 1995 notice, as did the 1987 order, warned Paprzycki: "Your continued disregard of this obligation may result ... in contempt proceedings against you which may lead to your imprisonment." (App. 105a).

Paprzycki argues that his right to procedural due process was violated in this case because the defendants did not follow the procedures set forth in the New Jersey Court Rules for the issuing of an arrest warrant. See N.J.Ct.R. 5:7-5(a) & 5:5-4(d). These procedures, he argues, are the minimum required to meet the due process requirement of the Constitution. Rule 5:7-5(a) states:

> (a) Contempt and Relief in Aid of Litigants Rights. If a person fails to make payments ... as directed by an order or judgment, the Probation Division responsible for monitoring and

> enforcing compliance should notify such person by mail that such failure may result in the institution of contempt proceedings. Upon the accumulation of a support arrearage equal to or in excess of the amount of support payable for 14 days... as ordered, the Probation Division shall file a verified statement setting forth facts establishing disobedience of the order or judgment.... [A]n aggrieved party, or the Probation Department on that person's behalf, may apply to the court for relief in accordance with Rule 1:10-3.

N.J.Ct.R. 5:7:5(a).

Rule 5:5-4(d), on the other hand, governs "all enforcement motions (also known as motions for enforcement of litigants rights, R. 1:10-3)." N.J.Ct.R. 5:5-4(d). It details how such motions are to be filed and how many days in advance such filings must be made[1]. After reviewing these procedures,

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[1] Rule 5;5-4(d) reads, in pertinent part: (d) Advanced Notice. ... All ... enforcement motions (also known as motions for enforcement of litigants' rights, R. 1:10- 3), or motions that deal with the status of children must be filed 16 days before the return date.
N.J.Ct.R. 5:5-4(d).

Rule 1:10-3 reads, in pertinent part:
Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. ... If an order entered on such an application provides for commitment, it shall specify the terms of release provided, however, that no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based

the District Court held that none of these rules require notice for enforcement motions beyond the notice that had already been provided to Paprzycki in this case. See Paprzycki v. County of Somerset et al., (D.C. N.J. 1998) (App. 92a). We agree.

Moreover, even if the New Jersey Court Rules were not strictly complied with in this instance, and even if it be assumed that this non-compliance would violate due process, Paprzycki has once again named the wrong defendants. The defendants identified in this case, in other words, are not the ones who are responsible for any defects in the procedure to issue a warrant. Kirk did not request the warrant, issue the warrant, or use the warrant to arrest Paprzycki. Kirk's only responsibility (in this regard) was to schedule a hearing for obligors once they had been arrested:

> [Kirk:] I was called the "warrant officer," meaning that once the investigator requested the warrant - in other words, they determined that someone was in violation of the court order - then once the warrant was signed by the judge, then it was my responsibility, upon the obligor's arrest, to bring the case before court.

(App. 149a (Kirk Deposition)).

Similarly, Higgins, Kirk's supervisor, had absolutely no contact with Paprzycki and was not responsible for the warrant

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on a claim for equitable relief including orders and judgments from the Family Part and except if a judgment creditor demonstrates to the court that the judgment debtor has assets that have been secreted away or otherwise placed beyond the reach of execution.
N.J.Ct.R. 1:10-3.

at any stage. While Paprzycki charges that Higgins neglected to train Kirk on what procedures to follow to issue a warrant, the failure to follow the correct procedures, if they were in fact incorrectly followed, did not occur in the course of Kirk's duties as a warrant officer.

B. The Subsequent Monthly Hearings

Paprzycki also contends that the defendants violated his procedural due process rights when they failed to provide adequate notice for subsequent monthly hearings. He does not claim, however, that he was unaware that hearings were to be held monthly. Indeed, both the Judge and Kirk informed Paprzycki that he would have the opportunity for a hearing each month. Thus, Paprzycki was on notice to the extent that he knew a Judge would hear his case monthly. The hearings were scheduled fairly regularly, usually within the same one-week window each month. The only issue, therefore, is whether it violated procedural due process not to provide advance notice to Paprzycki of the exact date of each hearing. Under the flexible standard established in Mathews v. Eldridge, 424 U.S. 319 (1971), we conclude that the notice in fact given passes constitutional muster.

Moreover, it was the Court and not Kirk or Higgins that was responsible for the scheduling of hearings. The date upon which an obligor has his hearing is dependent on the docket and availability of the judge, matters over which Kirk and Higgins had no control.

3. Did the District Court err in holding that the defendants did not violate the plaintiffs' constitutional substantive and procedural due process rights by failing to provide relevant information to the Superior Court Judge or by failing to recommend to the Judge that the plaintiff be released from jail?

Paprzycki alleges that defendants denied him his substantive and procedural due process rights when they failed (1) to inform Judges Dilts and Ross that Paprzycki was indigent and unable to pay his arrears and (2) to recommend that Paprzycki be released for that foregoing reason. Paprzycki argues that the policy of the New Jersey Superior Court is to release any obligor who is deemed indigent, and that to keep an obligor in jail when he is known to be indigent violates his constitutional right to due process.

In support of this claim, Paprzycki cites a 1995 inter-court memorandum detailing the policy of the Superior Court of New Jersey with regard to support enforcement cases. The stated purpose of the policy is "to insure timely hearing and due process for litigants and to ensure the efficient use of limited judicial resources." (App. 72a). Paprzycki points to two relevant aspects of the policy that he believes were violated in the instant case. Those sections read:

> 4. In those matters where the obligor does not meet the conditions of release [i.e., obligor is unable to pay the amount owed], a probation representative shall meet with the obligor on a weekly basis for the purpose. of determining if there are any changes in status or if the obligor has a proposal to make to the court. Changes in status may be defined as:
>
> 1. Promise of Employment
> 2. Job Interview
> 3. Portion of a Payment
> 4. Change in Health.
>
> A change in status shall be reported to the hearing judge along with a recommendation from the probation representative. If as a result the conditions of release are modified, said modification shall be reported to the jail.

> 5. Obligors who remain in jail shall be reviewed in court no later than 30 days. If the obligor still has not met the conditions of release the presumption will be that the obligor lacks the ability to pay at the time and shall be considered for release under the general directive such as but not limited to:
>
> a. Shall report employment status weekly to the probation division
>
> b. Register with New Jersey Employment Services
>
> c. Comply with other such conditions as the court and/or probation deem appropriate.

(App. 73a-74a). Paprzycki charges that Kirk, as a probation officer, neglected his duty to inform the court of Paprzycki's status as an indigent obligor in violation of the above stated policy, and that Higgins, as Kirk's supervisor, is also responsible for the constitutional violation because he failed to adequately train Kirk in the proper procedures.

Under New Jersey law, only the judge may determine indigence, and Paprzycki had the opportunity monthly to attempt to persuade the judge that he was indigent. Neither the Court's internal memo nor any other New Jersey law called to our attention imposes upon a probation officer a duty - let alone a constitutional duty to inform the judge of anything other than "changes in status." As Kirk stated in his deposition, his duty before the Court was limited to stating the nature of each case and answering questions posed to him by the Judge:

> [Kirk:] I would present a case in court, and that is given the judge the current order of support, giving the judge [the obligor's] payment history over the last year, and beyond, if he were to ask for it.

> But as far as what we do~in court, it's total arrears payment history, current order, and that's what's presented on the record in court. As far as beyond that, then the judge asks the questions, obviously, and ascertains what he feels is appropriate or how he conducts the hearing, how he feels it's appropriate.

(App. 150a (Kirk Deposition)).

Even the case cited by Paprzycki places the duty on the Court rather than any other officer of the state: "The judge, before ordering any sanction, must determine that the defendant has the ability to comply with the order which he has violated, and incarceration may. be ordered only if made contingent upon defendant's continuing failure to comply with the order." Essex County Welfare Bd. v. Perkins, 133 N.J.Super, 189, 195 (App. Div.), cert. denied, 68 N.J. 161(1975) (cited in Appellants' Brief at 35) (emphasis added).

Thus, although it is unfortunate that Paprzycki remained in jail for over four months despite his apparent inability to pay his arrears, neither Kirk nor Higgins can be held responsible for his incarceration.

> **4. Did the District Court err in holding that the plaintiffs' state law claims were brought before the Court pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction) rather than 28 U.S.C. § 1332 (diversity jurisdiction) and that, accordingly, the Court could exercise its discretion and decline to hear the state law claims?**

Plaintiffs do not contend that the District Court abused its discretion in declining to exercise supplemental jurisdiction over the their state law claims. See 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1965). Rather,

they argue that the state law claims were rightly before the Court pursuant to 28 U.S.C. § 1332(a)(1) (diversity jurisdiction) and not 28 U.S.C. § 1367. Accordingly, argue plaintiffs, the District Court must hear state law claims because it does not have discretion to decline hearing them in diversity cases.

It is undisputed that the parties in this case are from different states. The plaintiffs, however, failed to allege an amount in controversy in their complaint that meets the $75,000 threshold required by the jurisdictional statute. Indeed, the plaintiffs make no reference to an amount in controversy at all in their complaint; the first time they mention the $75,000 amount in controversy requirement at all is in their Reply Brief. See Appellants' Reply Brief at 10.

Nevertheless, plaintiffs cite St. Paul Mercury Indemnity Co. V. Red Cab Company, 303 U.S. 283 (1938), for the proposition that "the plaintiff does not have to prove exact damages when confronted with the defendants' motion to dismiss for want of jurisdiction. It is sufficient if the Court can determine that the defendant in all reasonable likelihood could obtain a judgment in excess of the $75,000 jurisdictional limit." Appellants' Reply Brief at 11.

This is not, however, an accurate representation of what the Supreme Court said in Red Cab. Rather, Red Cab held that: The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

Id. at 288-89 (emphasis added). This standard is known as the "legal certainty standard." It applies when defendants challenge the jurisdiction of a court by suggesting that the amount in controversy pled by the plaintiffs is inaccurate or overstated.

At issue in this case is not whether the plaintiffs made a good faith pleading of an amount in controversy, but whether the amount in controversy requirement can be met when the complaint did not plead any amount at all. In this respect, the appellants reliance on Red Cab is misplaced. Red Cab does not have anything to say about finding diversity jurisdiction in cases where no amount in controversy; whatsoever was pled in the complaint.

Subsequent courts have understood that the standard articulated in Red Cab only applies when some amount has been pled and is challenged by the defendant. See e.g., Spectator Management Group v. Brown, 131 F.3d 120, 122 (3d Cir. 1997) ("A complaint will be deemed to satisfy the required amount in controversy unless the defendant can show to a legal certainty that the plaintiff cannot recover that amount.") (emphasis added); Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1996) (stating that the "legal certainty" standard from Red Cab applies "[o]nce a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction") (emphasis added).

Since the plaintiffs' original complaint did not plead any amount at all, the District Court properly found that the state law claims were before it under 28 U.S.C. § 1367 rather than 28 U.S.C. § 1332.

IV.

The judgments of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s / Walter K. Stapleton Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO.99-5777

PAUL PAPRZYCKI; ELIZABETH PAPRZYCKI; PAUL PAPRZYCKI, JR.,by his Guardians Ad Litem, his parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI; ANGELINA PAPRZYCKI, by her Guardians Ad Litem, her parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI, Appellants

V

COUNTY OF SOMERSET; SOMERSET COUNTY PROBATION DEPARTMENT; JOHN HIGGINS, Chief Probation Officer; RONALD KIRK; THE STATE OF NEW JERSEY

On Appeal From The United States District Court
For the District of New Jersey
(D.C. Civil No. 98-cv-00871)

District Judge: Honorable Anne E. Thompson

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 18, 2000
BEFORE: MANSMANN, RENDELL and STAPLETON, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on July 18,2000, On consideration whereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered August 17, 1999, be and the same is hereby affirmed.

Costs taxed against appellants.

ATTEST:

Acting Clerk

Dated: July 28, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil No.98-871 (AET)

PAUL PAPRZYCKI, and ELIZABETH PAPRZYCKI, individually, and PAUL PAPRZYCKI, JR. and ANGELA PAPRZYCKI, by their Guardians Ad Litem, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI,
Plaintiffs,

V.

COUNTY OF SOMERSET, SOMERSET, COUNTY PROBATION DEPARTMENT, JOHN HIGGINS, Chief Probation Officer, RONALD KIRK, and THE STATE OF NEW JERSEY,
Defendants.

ANNE E. THOMPSON. U.S.D.J.

OPINION

This matter is before the Court on motion of defendants John Higgins ("Higgins") and Ronald Kirk ("Kirk") (collectively "defendants") for summary judgment pursuant to FED. R. Civ. P.56. The Court heard oral argument on August 9, 1999. For the following reasons, defendants' motion is granted.

I BACKGROUND

This lawsuit arises from the incarceration of plaintiff Paul Paprzycki ("plaintiff') at the Somerset County Jail for his alleged failure to pay child support arrearages relating to two minor children born of his former marriage to Katherine Presser Traynor ("Katherine").

Plaintiff was divorced from Katherine on May 28, 1987. The divorce decree made no specific provisions for child support. However, two Orders of Support provided for payment

of sixty-three dollars per week for the two children born of the marriage. It is undisputed that plaintiff made these required payments for a period of almost two years. At some point after the divorce, plaintiff and Katherine cohabitated and wage execution for support was terminated during this period. The parties eventually separated permanently. Plaintiff alleges that he continued to make voluntary payments for some time thereafter before ceasing.

By Order dated February 9, 1987 ("February 1987 Order"), the Honorable Graham T. Ross required plaintiff to pay child support in the amount of sixty-three dollars per week, plus thirty dollars per week toward arrears. The February 1987 Order also provided that a warrant would issue upon the first missed payment and required plaintiff to notify defendant Somerset County Probation Department ("Probation") of any change in address or employment.

Plaintiff thereafter moved without notifying Probation. Because plaintiff could not be located, Judge Ross, by Order dated August 16, 1990 ("August 1990 Order"), relieved Probation of "any further supervision of future support collections," but provided that Probation should "continue locate efforts and reopen collection enforcement at the time the obligor is located."

On June 18, 1993, the Honorable Edmund R. Bernhard entered Judgment of Adoption, which terminated plaintiff's parental rights to the children born of his marriage to Katherine and effected the adoption of these children by Katherine's current husband, James G. Traynor.

In June 1995, Melissa A. Callahan, the Probation investigator assigned to plaintiff's case, determined that plaintiff was residing in Bound Brook, New Jersey. By Order dated July 13, 1995 ("July 1995 Order"), the Honorable Thomas H. Dilts ordered that Probation "re-open their files in this matter and that the obligor, Paul Paprzycki, pay $63.00 per week plus $30.00 per week on arrears through the Somerset County Probation

Department for the support of one minor child by Income Withholding, effective August 16, 1990."

On July 29, 1995, Probation generated through its Automated Child Support Enforcement System ("ACSES") and sent to plaintiff a Notice of Delinquency, which stated:

> On July 13, 1995, an order/judgment was entered directing you to make support and/or arrears payments through the Somerset County Probation in the sum of $93.00 every week. Our records indicate that you have failed to comply with this order and that arrears are $26,555.66 as of July 29, 1995.
>
> Your continued disregard of this obligation may result in court proceedings on behalf of your dependent(s) or in contempt proceedings against you which may lead to your imprisonment; an attachment of your assets; or other sanctions by the court. Additionally, your federal, state and/or homestead rebate tax refunds may be withheld.
>
> It is expected that you will resume support payments immediately. In addition, you must take measures to eliminate the existing arrearage.

This Notice was signed by defendant John Higgins.

Despite the July 1995 Order and Probation's Notice of Delinquency, plaintiff failed to pay. As a result, Ms. Callahan requested a bench warrant for plaintiff's arrest. In support, Ms. Callahan submitted an affidavit dated September 7, 1995, wherein she opines:

> 1. The obligor has failed to continue on the

present Order[1] of $63 .00 per week plus $30.00 per week on arrears through the Somerset County Probation Department for the support of one minor child by Income Withholding; one missed payment a Warrant shall be issued.

2. The arrears in this matter are $26,807.66 as of August 24, 1995.

The matter was then referred to Kirk, warrant officer responsible for processing bench warrants. Kirk reviewed Ms. Callahan's warrant request and presented the request to Judge Ross. Judge Ross signed the bench warrant on September 8, 1995 and it was forwarded to the Sheriff to effectuate plaintiff's arrest. Plaintiff was arrested on or about October 17, 1995. Plaintiff was incarcerated from October 1995 until February 1996. Plaintiff was periodically brought before the court on thirty day intervals to review his civil incarceration on November 17, 1995, December 22, 1995, January 30, 1996, and February 2, 1996. At the October 18, 1995 hearing, Probation reported that plaintiff was in arrears for a total sum of $27,248.66. At the November 17, 1995 hearing, plaintiff was reported to be in arrears for $19,625.66; Kirk explained that Probation had learned of the June 18, 1993 Judgment of Adoption and adjusted the amount of arrears to reflect the change in plaintiffs obligation. At the December 22, 1995 hearing, plaintiff reportedly owed $44,490; Kirk explained that Probation had learned of a second Order of Support, requiring plaintiff to pay sixty-three dollars per month for his second minor child, and therefore doubled the amount of arrears owed.

Plaintiff alleges that, during the period of his

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[1] 'It appears that the "present Order" to which Ms. Callahan refers is the February 1987 Order.

incarceration, he informed Kirk that he was indigent. Plaintiff alleges that, at the time of his incarceration, he was employed by Jeff Alte Roofers and was earning approximately $400.00 per week. His net pay after taxes was approximately $290.00 which he alleges was used to support his wife, Elizabeth Paprzycki, and their two children, Paul and Angelina. Plaintiff alleges that he possessed no assets, liquid or otherwise, with which to make a lump sum payment towards his alleged arrearage. Plaintiff alleges that he informed Kirk of his willingness to make weekly payments towards the arrearage via garnishment of his wages and indicated that his employer was willing to loan him one thousand dollars to use as a lump sum payment.

Plaintiff further alleges that at no time was he represented by counsel despite being indigent or informed of his right to a plenary hearing to assess his ability to pay. On February 13, 1996, Gaetano DeSapio, Esq. undertook a pro bono representation of plaintiff. Mr. DeSapio filed an emergent application on plaintiff's behalf seeking his immediate release which was denied by Judge Ross by letter dated February 15, 1996. Plaintiff's counsel subsequently appealed Judge Ross's decision to the Appellate Division. By Order entered February 26, 1996, the Appellate Division ordered plaintiff's immediate release pending a plenary hearing on his ability to pay. Plaintiff's counsel filed, and the New Jersey Supreme Court dismissed, numerous motions on plaintiff's behalf and dismissed a petition for certification as moot.

Plaintiffs filed this lawsuit on February 25, 1998. The Complaint asserts the following causes of action: Count I-negligence by all defendants; Count II-deprivation of liberty without due process of law and the right to equal protection of the laws, and other rights and privileges, as guaranteed by the Filth, Sixth, Eighth and Fourteenth Amendments by all defendants; and Count III-deliberate indifference for plaintiff's constitutional rights as to defendants County of Somerset,

Probation, State of New Jersey, and Higgins under a supervisory liability theory. On June 17, 1998, the Court dismissed all claims against defendants State of New Jersey and Somerset County Probation Department. By Order dated June 26, 1998, the Court amended its June 17 Order to also dismiss all claims against defendant County of Somerset. On July 15, 1999, defendants Kirk and Higgins filed this motion for summary judgment.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law; See FED. R. Civ. P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party satisfies this initial burden, the opposing party must establish that a genuine issue exists. See Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied 475 U.S. 1013 (1986). Issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 ~986). The opposing party cannot rest upon mere allegations, but must present actual evidence that creates a genuine issue of material fact. See id. at 249 (citing First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). In turn, the court must draw all reasonable inferences in favor of the opposing party and must accept that party's evidence. See Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3d Cir. 1986).

B. Section 1983

Section 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States which takes place "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." 42

U.S.C. § 1983. Section 1983 "does not create substantive rights, but provides a remedy for the violation of rights created by federal law." See Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995) (citing Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985)). "A prima facie case under § 1983 requires a plaintiff to demonstrate that: (1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law." Id. (citations omitted).

Defendants do not dispute that they were acting under color of state law during the pertinent time. Thus, the Court confines its analysis to determining whether plaintiffs have identified facts supporting deprivation of their federal rights.

1. Due Process

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law ...." The due process clause

> "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them[, and] ... it is a guarantee of fair procedure, sometimes referred to as 'procedural due process,' [under which the State may not] take property without providing appropriate procedural safeguards."

Rivkin v. Dover Township Rent Leveling Bd., 143 N.J. 352, 364 (1996) (quoting Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring)), cert. denied 117 5. Ct. 275 (1996). Plaintiff's complaint asserts both procedural and substantive due process claims.

a. Procedural due process

Procedural due process is a flexible concept, "'call[ing] for such procedural protections as the particular situation demands.'" Gilbert v. Homar, 117 5. Ct. 1807, 1812 (1997) (quoting Monissey v. Brewer, 408 U.S. 471, 481(1972)); Mettinger v Globe Slicing Machine Co., Inc., 153 N.J. 371, 389 (1998). Minimum requirements are notice and an opportunity to be heard. See Mettinger, 153 N.J. at 389; In re C.A., 146 N.J. 71, 94 (1996). However, what is required to satisfy procedural due process in a given situation depends on the balancing of three factors:

> first the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiff contends that Kirk violated his right to procedural due process when he obtained the arrest warrant without notice and an opportunity to be heard, and scheduled subsequent contempt hearings without notice to plaintiff. Plaintiff further contends that Higgins violated his procedural due process rights by failing to adequately train Kirk. Defendants counter that plaintiff had notice via the February 1987 Order and Notice of Delinquency and was afforded an opportunity to be heard by Judge Ross on October 18, 1995 and on a monthly basis thereafter.

In this case, plaintiff had notice and an opportunity to be heard. In September 1995, when the warrant for plaintiff's arrest was applied for and issued, the February 1987 Order, which provided that a warrant would issue upon the first missed payment, was still in force. The August 1990 Order suspended Probation's enforcement duties under the February 1987 Order, but provided that such duties would resume upon Probation's location of plaintiff. The July 1995 Order lifted the suspension of Probation's enforcement duties, relating back to August 1990, but it did not supplant the February 1987 Order. The Court concludes that the February 1987 Order, in conjunction with the July 29, 1995 Notice of Delinquency, provided plaintiff with sufficient notice that his failure to pay could lead to imprisonment. Plaintiff does not dispute that he had an opportunity to be heard immediately upon his arrest and on a monthly basis thereafter. Plaintiff's procedural due process rights were, in this regard, adequately protected.

Plaintiff's reliance on Rules 5:7-5 and 5:54, of the Rules Governing Practice in the Chancery Division, Family Part, is misplaced. Rule 5:7-5 provides that, in respect of violation of a court order to pay child support, "[t]he court... may..., in its discretion, institute contempt proceedings in accordance with Rule 1:10-2, and an aggrieved party, or the Probation Division on that person's behalf, may apply to the court for relief in accordance with Rule 1:10-3." Rule 1:10-2, of the Rules of General Application, outlines the procedure for summary contempt proceedings upon an order for arrest or order to show cause; it does not require notice or an opportunity to be heard before such order for arrest may issue. Rule 1:10-3, of the Rules of General Application, provides that an obligee may seek enforcement of a court order by application to the court; it does not require the obligee to follow the procedure set forth in Rule 5:54 for motions in family actions or otherwise require notice to or an opportunity to be heard by the obligor. Rule 5:5-4 does not require that Rule 1:10-3 applications for enforcement be

made by motion. These rules support rather than condemn actions taken by Kirk in this case.

Plaintiff also contends that Kirk violated his right to procedural due process by failing to inform him of his right to counsel. Plaintiff argues that Higgins violated his due process rights by failing to train Kirk to advise plaintiff of his right to counsel. Defendants contest that an obligor has the right to counsel in a civil proceeding involving enforcement of a child support order. Alternatively, defendants argue that, if such a right exists, it is the court's responsibility to apprise the obligor of that right, not the responsibility of Probation or the probation officer assigned to the case.

There is caselaw supporting plaintiff's right to counsel in this case. See Lassiter v. Department of Social Servs. of Durham County, 452 U.S. 18, 26-27 (1981) (establishing "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his personal liberty"); Walker v. McLain, 768 F.2d 1181, 1183 (10th Cir. 1985) (holding that Lassiter presumption applies in civil contempt proceeding arising out of failure to pay child support), cert. denied, 474 U.S. 1061(1986); Essex County Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195-96 (App. Div.), cert denied 68 N.J. 161(1975); see also Black v. Division of Child Support Enforcement, 686 A.2d 164, 167-68 (')el. 1996) (finding, in child support context, that "Lassiter presumption applies to all State-initiated contempt proceedings where the defendant is faced with the possibility of losing his personal freedom, regardless of whether the contempt hearing is styled civil or criminal"). However, even assuming that plaintiff had a right to counsel, the court, not Kirk or Probation, had the responsibility to advise him of that right. See Walker 768 F.2d at 1185 ("An indigent's right to appointed counsel imposes on the court an obligation to inform him of that right."); c.f Black 686 A.2d at 168 holding that it rests with the court to determine whether defendant faces the possibility of

incarceration and, if so, to appoint counsel).

Plaintiff further alleges Kirk had unauthorized ex parte communications with the court. Defendants argue that plaintiff incorrectly suggests Kirk acted as prosecutor or on Katherine's behalf. Defendants explain that, rather, "the probation officer merely fulfills an administrative function by providing information to the court at the court's request" Defendants contend that it would be difficult for Kirk to fulfill this administrative function without meeting with the court. The Court agrees. Probation is not, as plaintiff argues, an agent of the obligee to a child support order. Probation "is an arm of the state judicial system. It performs investigations and collects monies for the courts in both civil and criminal matters." Essex County Welfare Bd.,133 N.J. Super. at 196. Plaintiff cites no support for his proposition that a probation officer cannot meet with the court in private prior to commencement of a child support enforcement hearing in order that he may provide information to the court on the particular case. This Court is not willing to so restrict the Probation's ability to fulfill its function.

Finally, plaintiff alleges Probation and Kirk failed to accurately report plaintiff's support obligations to the court. Defendants argue that the amount of arrears Kirk reported to the court fluctuated due to Probation's receipt of information regarding the Judgment of Adoption and the preexisting Order of Support for plaintiff's second minor child. Defendants explain that, once Probation became aware of the Judgment of Adoption, it decreased plaintiff's arrears to reflect termination of plaintiff's continuing obligation to pay child support relating back to June 18, 1993, and that, once Probation became aware of the second Order of Support, it doubled the arrears. Defendants argue that plaintiff could have brought the above information to Probation's attention or informed the court of any disagreement he had with the amount of arrears reported. Defendants also argue that, although Probation reported fluctuating support obligations, the issue before the court was

nonpayment, not the amount of arrears. Plaintiff presents no evidence to substantiate this allegation and does not refute defendants' argument that plaintiffs support obligation was simply adjusted to reflect newly acquired information. Such adjustment did not deprive plaintiff of his right to procedural due process, especially where plaintiff was aware of both the Judgment of Adoption and the second Order of Support and failed to inform Probation or the court that an adjustment was appropriate.

Plaintiff's procedural due process claims cannot survive summary judgment.

b. Substantive due process

Plaintiff also claims that defendants deprived him of his right to substantive due process. "To establish a substantive due process claim, a plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action." Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). Governmental action offends substantive due process if it is "not rationally related to a legitimate governmental interest" or if it was "in fact motivated by bias, bad faith or improper motive." Id. (citation and internal quotation marks omitted). Even assuming plaintiff was deprived of a protected liberty interest, plaintiff does not allege that defendants' failure to act on his behalf was arbitrary. Plaintiff argues that defendants violated his right to substantive due process by failing to advise the court that plaintiff was indigent and unable to pay. Plaintiff's contention notwithstanding, it was the responsibility of the court to determine whether plaintiff was indigent see Walker, 768 F.2d at 1184-85, and/or capable of complying with the child support orders, see Biddle v. Biddle, 150 N.J. Super. 185, 191 (Ch. Div. 1977). That Judge Ross routinely relies upon information gathered by Probation, through its officers and investigators, to determine a child support obligor's ability to pay, does not

transfer from the Court to Probation its duty to determine ability to pay or responsibility for failure to do so. Plaintiff's substantive due process claim cannot survive summary judgment.

2. Equal Protection

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws." "Equal protection of the law simply requires that all persons similarly situated be dealt with alike." State v. Zapata, 297 N.J. Super. 160, 176 (App. Div. 1997), cert. denied. 156 N.J. 405 (1998). Thus, "[o]nly when a state 'adopts a rule that has a special impact on less than all persons subject to its jurisdiction' does a question arise as to whether the equal protection clause is violated." Alexander v. Whitman, 114 F.3d 1392, 1407 (3d Cir. 1997) (quoting New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979)), cert. denied 118 S. Ct. 367 (1997). However, equal protection "does not require that things which are different in fact be treated in law as though they are the same." Id. States are granted broad discretion to enact laws which may affect different citizens differently. Id. "'[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights [will] be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'." (quoting Federal Communications Comm. v. Beach Communications, 508 U.S. 307, 313 (1993)).

In this case, plaintiff contends that defendants' treatment of his case violated his right to equal protection of the laws. There is no suggestion that defendants' treatment of plaintiff's case somehow proceeded along suspect lines. Rather, plaintiff alleges that defendants' behavior infringed a fundamental constitutional right As concluded above, however, plaintiff

cannot show that defendants infringed upon plaintiffs fundamental constitutional right to personal liberty. As a result, the Court reviews defendants' actions under the rational basis test. Plaintiff alleges only that "defendants had a policy in which cases such as the plaintiffs were regularly handled in the same manner as that of the plaintiff." Plaintiff does not allege that defendants' treatment of his case lacked a rational basis. Nor does the Court find that defendants' behavior was irrational. Plaintiff's equal protection claim cannot survive summary judgment.[2]

3. Right of Familial Association

It is alleged that, during plaintiffs incarceration, he and his wife, Elizabeth, "were denied the conjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid and support of each other." Elizabeth was also denied financial support. It is further alleged that plaintiffs two children, Paul and Angelina, "were denied the companionship of their father and the nurturing and attention that accompanies that." Plaintiff argues that Elizabeth, Paul and Angelina have separate causes of action, cognizable under Section 1983, for violation of their constitutional right to familial association. Defendants argue that Elizabeth, Paul and Angelina did not personally suffer any deprivation of their constitutional rights, and that they therefore have no standing to bring derivative claims under Section 1983. Assuming for the sake of this motion that Elizabeth, Paul and Angelina have a constitutionally-protected right to familial association, the Court finds, for the reasons set forth above, that defendants are

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[2] Because plaintiffs' Section 1983 claims will be dismissed, the Court need not address defendants' separate qualified immunity, statute of limitations, or punitive damages arguments.

not responsible for. any deprivation thereof. The Section 1983 claims of Elizabeth, Paul and Angelina cannot survive summary judgment.

C. Negligence

The Court will exercise its discretion and decline to exercise supplemental jurisdiction over plaintiffs' state claims. See 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1965).

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted. An appropriate order is filed herewith.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil No.98-871 (AET)

PAUL PAPRZYCKI, and ELIZABETH PAPRZYCKI, individually, and PAUL PAPRZYCKI, JR. and ANGELA PAPRZYCKI, by their Guardians Ad Litem, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI,
Plaintiffs,

V.

COUNTY OF SOMERSET, SOMERSET, COUNTY PROBATION DEPARTMENT, JOHN HIGGINS, Chief Probation Officer, RONALD KIRK, and THE STATE OF NEW JERSEY,
Defendants.

ANNE E. THOMPSON. U.S.D.J.

OPINION

For the reasons set forth in the Court's Opinion filed herewith, and for good cause shown,

IT IS on this 16th day of August, 1999,

ORDERED that the motion of defendants John Higgins and Ronald Kirk for summary judgment pursuant to FED. R. Civ. P 56 is granted; and it is further

ORDERED that this case is closed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO.99-5777

PAUL PAPRZYCKI; ELIZABETH PAPRZYCKI; PAUL PAPRZYCKI, JR.,by his Guardians Ad Litem, his parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI; ANGELINA PAPRZYCKI, by her Guardians Ad Litem, her parents, PAUL PAPRZYCKI and ELIZABETH PAPRZYCKI, Appellants

V

COUNTY OF SOMERSET; SOMERSET COUNTY PROBATION DEPARTMENT; JOHN HIGGINS, Chief Probation Officer; RONALD KIRK; THE STATE OF NEW JERSEY

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGARRD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES and STAPLETON,* Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

*Judge Stapleton's vote was limited to panel rehearing only.

BY THE COURT,
Circuit Judge

AUG 31, 2000

Rule 1:6-2. Form of Motion; Hearing

(a) Generally. An application to the court for an order shall be by motion, or in special cases, by order to show cause. a motion, other than for bail pursuant to R.3:26-2(d) or one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be presented to the court, the grounds upon which it is made and the nature of the relief sought and other than motions in family actions pursuant to R. 5:5-4 in which oral argument is sought, shall be accompanied by a proposed form of order in accordance with R.3:1-4(a) or R.4:42-1(e), as applicable. The form of order shall note whether the motion was opposed or unopposed. If the motion or response thereto relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with R.1:6-6. The motion shall be deemed uncontested and three shall be no right to argue orally in opposition unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought.

(b) Civil Motions in Chancery division and Specially Assigned Cases. When a civil action, by reason of its complexity or other good cause, has been specially assigned prior to trial to an individual judge for disposition of all pretrial and trial proceedings and in all cases pending in the superior court, Chancery division, all motions therein shall be made directly to the judge assigned to the cause, who shall determine the mode and scheduling of their deposition. Except as provided in R. 5:5-4, motions filed in cases pending in the superior court, Chancery Division, Family Part, shall be governed by this paragraph.

(c) Civil and Family Part Discovery and Calendar Motions. Every motion in a civil case or a case in the Chancery Division, Family Part, not governed by paragraph (b), involving any aspect of pretrial discovery or the calendar, shall be listed for

disposition only if accompanied by a certification stating that the attorney for the moving party has either (1) personally conferred orally or has specifically described good faith attempt to confer orally with the attorney for the opposing party in order to resolve the issues raised by the motion by agreement or consent order and that such effort at resolution has been unsuccessful, or (2) advised the attorney for the opposing party by letter, after the default has occurred, that continued non-compliance with a discovery obligation will result in an appropriate motion being made without further attempt to resolve the matter. The moving papers shall also set forth the date of pretrial conference, calendar call or trial date, or state that no such dates have been fixed. Discovery and calendar motions shall be disposed of on the papers unless, on at least two days notice, the court specifically directs oral argument on its own motion or, in its discretion, on a party's request. a movant's request for oral argument shall be made either in the moving papers or reply; a respondent's request for oral argument shall be made in the answering papers.

(d) Civil and Family Part Motions -- Oral Argument. Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to al other motions, the request shall be granted as of right. Except as otherwise provided by paragraph (b) and insofar as is practicable, all subsequent motions in the cause, other than motions directly addressed to the trial or arbitration calendar, shall be heard by the same judge who heard the first motion in the cause.

(e) Oral Argument -- Mode. The court in civil matters, on its own motion or on a party's request, may direct argument of any motion by telephone conference without court appearance. A verbatim record shall be made of all such telephone arguments and the rulings thereon.

(f) Order; Record Notation. If the court has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall so note indicating whether the findings and conclusions were written or oral and the date on which they were rendered. If no such findings have been made, the court shall append to the order a statement of reasons for its disposition if it concludes that explanation is either necessary or appropriate. A written order or record notation shall be entered by the court memorializing the disposition made on a telephone motion.

Rule 1:10-2. Summary Contempt Proceedings on Order to Show Cause or Order for Arrest

(a) Institution of Proceedings. Every summary proceeding to punish for contempt other than proceedings under R.1:1-10-1 shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of _____Charges with Contempt of Court."

(b) Release Pending hearings. A person charged wit contempt under R.1:10-2 shall be released on his or her own recognizance pending the hearing unless the judge determines that bail is reasonably necessary to assure appearance. The amount and sufficiency of bail shall be reviewable by a single judge of the Appellate Division.

(c) Prosecution and Trial. A proceeding under R. 1:10-2 may be prosecuted on behalf of the court only by the Attorney General, the County Prosecutor of the county, or where the court for good cause designates an attorney, then by the

attorney so designated. The matter shall not be heard by the judge who instituted the prosecution if the appearance of objectivity requires trial by another judge. Unless there is a right to a trial by jury, the court in its discretion may try the matter without a jury. If there is an adjudication of contempt, the provisions of R.1:10-1 as to stay of execution of sentence shall apply.

Rule 1:10-3. Relief to Litigant.

Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not be disqualified because he or she signed the order sought to be enforced. If an order entered on such application provides for commitment, it shall specify the terms of release. The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule. an application by a litigant may be tried with a proceeding under R. 1:10-2(a) only with the consent of all parties and subject to the provisions of R. 1:10-2(c).

Rule 5:5-4. Motions in Family Actions.

(a) [Motions.] Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of disposition of motions, the court shall ordinarily grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions. When a motion is brought for enforcement or modification of a prior order or judgment, a copy of the order or judgment sought to be enforced or modified shall be appended to the pleading filed in support of the motion. When a motion is brought for the modification of an order or judgment for alimony or child support, the pleading filed in support of the motion shall have appended to it a copy of the prior Case

Information Statement or Statements filed before entry of the order or judgment sought to be modified and a copy of a current Case Information Statement.

(b) [Time for Service and Filing.] a notice of motion, except for motions brought pursuant to R. 1:10-3 and motions involving the status of a child, filed more than 45 days after the entry of the written judgment of divorce or annulment, other than an ex parte motion, shall be served and filed, together with supporting affidavits and briefs, when necessary, not later than 29 days before the time specified for the return date. For example, a motion must be served and filed on the Thursday for a motion date falling on a Friday 29 days later. Any opposing affidavits, cross-motions or objections shall be served and filed not later than 15 days before the return date. For example, a response must be served and filed on a Thursday for a motion date falling on a Friday 15 days later. Answers or responses to any opposing affidavits and cross motions shall be served and filed not later than 8 days before the return date. For example, such papers would have to be served and filed on a Thursday for a motion date falling on the Friday of the following week. If service is made by mail, 3 days shall be added to the above time periods.

(c) Advance Notice. Every motion shall include the following language: NOTICE TO LITIGANTS: IF YOU WANT TO RESPOND TO THIS MOTION YOU MUST DO SO IN WRITING. This written response shall be by affidavit or certification. (Affidavits and certifications are documents filed with the court. In either document the person signing it swears to its truth and acknowledges that they are aware that they can be punished for not filing a true statement with the court. Affidavits are notarized and certifications are not.) If you would also like to submit your own separate requests in a motion to the judge you can do so by filing a cross-motion. Your response and/or cross-motion may ask for oral argument. That means you can ask to appear before the court to explain

your position. However, you must submit a written response even if you request oral argument. That means you can ask to appear before the court to explain your position. However, you must submit a written response even if you request oral argument. Any papers you send to the court must be sent to the opposing side, either to the attorney if the opposing party is represented by one, or to the other party if they represent themselves.

The response and/or cross-motion must be submitted to the court by a certain date. All pre-divorce motions, all enforcement motions (also known as motions for enforcement of litigants' rights, R. 1:10-3), or motions that deal with the status of children must be filed 16 days before the return date. (Since most motion days are on a Friday, motion papers must be filed on the Wednesday 16 days before.) Therefore, a response and/or cross motion must be filed 8 days (Thursday) before the return date. All post-judgment motions including all motions for modification of alimony, child support, custody or visitation must be filed 29 days (Thursday) before the (Friday) return date. Therefore, a response and/or cross-motion must be filed 15 days (Thursday) before the return date. If you mail in your papers you must add three days to the above time periods.

Response to motion papers sent to the court are to be sent to the following address:_____. Call the Family Division Manager's office (_____) if you have any questions on how to file a motion, cross-motion or any response papers. Please note that the Family Division Manager's office cannot give you legal advice.

Rule 5:7-4. Alimony and Child Support Payments.

(a) Allocation of Support. In awarding alimony, maintenance or child support, the court shall separate the amounts awarded for alimony or maintenance and the amounts awarded for child support, unless for good cause shown the court determines that the amounts should be unallocated. In

awarding child support, payments for health care, child care and other expenses necessary to maintain the child or children shall be designated as part of the child support award unless good cause is shown why such amounts should be separated.

(b) Payments Through the Probation Division. The judgment or order shall be enforceable in the county of the obligor's residence and shall provide that payments be made "through the probation Division of the county in which the obligor resides." When an obligors' county of residence changes, the transfer of responsibility for the collection and enforcement of such judgment or order shall be governed by te policies established by the Administrative Director of the Courts. Alimony, maintenance or child support payments not presently made through the Probation Division shall be so made upon application of either party to the probation Division unless the other party, upon application to the court, shows good cause to the contrary. In non-dissolution support proceedings, the court shall record its decision using the Uniform Order for Summary Support shown in appendix XVI of these Rules. Upon the signing of any order that includes support or health insurance provisions t be administered by the Probation Division, the court shall, immediately after the hearing, send to the appropriate Probation Division one copy of the order which shall include statements prepared by the parties or their attorneys providing the names, dates of birth, Social Security Numbers, and mailing addresses of the parents and the children; the occupation and driver's license number of the parent who is ordered to pay support; the policy number and name of the health insurance provider of the parent who is ordered t insure the children; and, if income withholding is ordered, the name and address of the obligor's employer. When a party or attorney must prepare a formal written judgment or order pursuant to a judicial decision which includes support or health insurance provisions to be administered by the probation Division, the court shall, on the date of the hearing, record the

support and health insurance provisions on a Temporary Support Order using the form prescribed in Appendix XVII of these Rules and shall immediately have such order delivered to the Probation Division so that a support account can be established on the Automated Child Support Enforcement System (ACSES). Demographic information provided on the Temporary Support Order shall be limited to that which is required to establish an ACSES account and send case initiation documents to the parties and the obligor's employer. In addition to the information provided to the court with the final order or judgment as required by this paragraph, the parties and their attorneys shall provide additional family and benefit information at the request of the Probation Division. The Temporary Support Order shall remain in effect until a copy of the final judgment or order is received by the Probation Division. After a judgment or order is entered and the probation Division has established an ACSES support account, the obligor shall notify the appropriate Probation Division of any change of employer, health insurance provider or address and the obligee shall notify the Probation Division of a change of address or a change in the status of the children as may be required in the order or judgment within 10 days of the change, and any judgment or order which includes alimony or support shall so provide. Failure to provide information as to change of employer, health insurance provider or address shall be considered a violation of the order. Judgments or orders amending the amounts to be paid through the probation Division shall be treated in the same manner.

(c) Income Withholding. All complaints, notices, pleadings, orders and judgments which include child support filed or entered on or after October 1, 1990 shall comply with the income withholding provisions of Rule 5:7-5.

(d) Notices Applicable to All Orders and Judgments Which Include Child Support Provisions. The judgment or order shall include notices stating: (1) provisions of an order or judgment

are subject to income withholding when a child support arrearages has accrued in an amount equal to or in excess of the amount of support payable for 14 days. The withholding is effective against the obligor's current and future income from all sources authorized by law; (2) that any payment or installment of an order for child support or those portions of an order that are allocated for child support shall be fully enforceable and entitled to full faith and credit and shall be a judgment by operation of law on or after the date it is due; (3) that no payment or installment of an order for child support or those portions of an order that are allocated for child support shall be retroactively modified by the court except for the period during which the party seeking relief has pending an application for modification as provided in N.J.S.A. 2A:17-56.23a; and (4) that the driver's, occupational, and professional licenses, including a license to practice law, held or applied for by the obligor may be denied, suspended or revoked if: 1) a child support arrearage accumulates that is equal to or exceeds the amount of child support payable for six months, or 2) the obligor fails to provide health insurance for the child as ordered by the court within six months, or 3) a warrant for the obligor's arrest has been issued by the court for obligor's failure to pay child support as ordered, or for obligor's failure to appear at a hearing to establish paternity or child support, or for obligor's failure to appear at a child support hearing to enforce a child support order and said warrant remains outstanding.

(e) Additional Notices for Orders and Judgments Payable Through the Probation Division. Orders and judgments which include support provisions that are payable through the probation Division shall include notices, in addition to those listed in paragraph (d), stating: (1) that the amount of child support and/or the addition of a health insurance provision in Title IV-D cases shall be subject to review, at least once every three years, on written request by either party to the Division of Family Development, CN-716, Trenton, NJ 08625 and adjusted

by the court, as appropriate, or upon application to the court; (2) that the parties are required to notify the appropriate probation Division of any change of employer, address or health insurance provider within 10 days of the change and that failure to provide such information shall be considered a violation of the order; (3) that, in accordance with N.J.S.A. 2A:34-23b, the custodial parent may require the non-custodial parent's health insure to make payments directly to the health care provider by submitting a copy of the relevant sections of the order to the insurer; and (4) that Social Security numbers are collected and used in accordance with section 205 of the Social Security Act (42 U.S.C. 405), that disclosure of an individual's Social Security number for Title IV-D purposes is mandatory, that Social Security numbers are used to obtain income, employment and benefit information on individuals through computer matching programs with federal and state agencies, and that such information is used to establish and enforce child support under Title IV-D of the Social Security Act (42 U.S.C. 651 et seq.).

Rule 5:7-5 Failure to Pay; Enforcement by the Court or a Party; Income Withholding for Child Support; Suspension and Revocation of Licenses for Failure to Support Dependents; Execution of Assets for Child Support; Child Support Judgments and Post-Judgment Interest

(a) Contempt and Relief in Aid of Litigant's Rights. If a person fails to make payments or provide health insurance coverage as directed by an order or judgment, the Probation Division responsible for monitoring and enforcing compliance shall notify such person by mail that such failure may result in the institution of contempt proceedings. Upon the accumulation of a support arrearage equal to or in excess of the amount of support payable for 14 days or failure to provide health insurance coverage as ordered, the Probation Division shall file a verified statement setting forth the facts establishing

disobedience of the order or judgment. The court in the county in which the person against whom the award is made resides, unless another court is designated by order or Rule 5:7-6(a) otherwise provides, may then, in its discretion, institute contempt proceedings in accordance with Rule 1:10-2, and an aggrieved party, or the Probation Division on that party's behalf, may apply to the court for relief in accordance with Rule 1:10-3. If the aggrieved party states under oath in the application that he or she is indigent and unable to pay the required filing fees, the court, if satisfied of the fact of indigency, may waive the payment of such fees. If the application for relief is made on behalf of a party by the Probation Division, filing fees shall be waived, and may, in the discretion of the court, subsequently be assessed against the adverse party if it is determined that he or she has not complied with the order or judgment being enforced. for past-due alimony or child support payments that have been docketed as a civil money judgment with the Clerk of the Superior Court, the court may, on its own motion or on motion by the party bringing the enforcement action, assess a late interest charge against the adverse party at the rate prescribed by Rule 4:42-11(a)....